DATUK HARRIS MOHD SALLEH

v.

SECK MUN FOO

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: S-02-543 OF 1996]
10 APRIL 1999

TRUSTS: *Contract - Sale of land - Whether consideration passed to vendor - Whether vendor holding land as bare trustee for purchaser*

CIVIL PROCEDURE: *Appeal - Evidence, evaluation of - Consideration of grounds of judgment of trial judge - Whether trial judge erred in his findings*

CONTRACT: *Consideration - Whether consideration passed to vendor - Whether there was a concluded contract*

The appellant/defendant was the registered owner of a piece of land in Labuan ('the land') and was the Chief Minister of Sabah. The respondent/plaintiff was the president of Kelab Golf Labuan ('the Club'). The plaintiff had in 1991 filed a writ seeking declarations *inter alia* that: (i) the defendant held the land in trust for and on behalf of the Club; (ii) the defendant had no right to the ownership of the land; and (iii) there be an order cancelling the defendant's name in the title to the land and that the Club be registered instead. Upon a submission of no case to answer by the defendant, the High Court allowed the prayers sought by the plaintiff. The defendant appealed to the Court of Appeal.

Before the High Court, the plaintiff's contention was that the defendant had sold the land to the Club and was a bare trustee holding the land in trust for the Club which intended to build a golf course on the land. The defendant on the other hand, contended that there was no evidence that he had been paid any money or consideration for the land or that he or someone on his behalf had been compensated in any way for the land.

There was before the court evidence of a donation of RM1.6 million by Syarikat Berdikari ('Berdikari') and Syarikat Tambisan ('Tambisan') through the Sabah Sports Council ('SSC') to the Labuan District Council ('LDC') or to the contractor Syarikat Jati which eventually built the golf course. Berdikari had applied for and obtained a timber licence from the State Government on the condition that Berdikari would build a golf course complex for the Club. Tambisan was set up by Berdikari to carry out the logging works.

Before the Court of Appeal the appellant submitted that: (i) even if the donation was read as the consideration for the land, there was no evidence how the SSC applied the donation or how it was disbursed; (ii) the judge's finding was contrary to the plaintiff's pleaded case that payment was either from the proceeds of timber sale or set off from the proceeds of timber to the sum of RM1 million; (iii) the minutes of a phone call recorded from the District Officer Labuan on behalf of the appellant to a government department enquiring on the registration of the Club, which mentioned the purchase of property by the Club, should not be admitted as it was made by an unknown person; and (iv) the judge erred when he described the land as SL346 only.

The main issue was whether there was a concluded sale between the relevant parties.

Held:
Per Abu Mansor Ali JCA

[1] The learned judge found as a fact, from documents tendered before him, that there was a sale transaction of the land between Berdikari/Tambisan and the defendant. The learned judge also found as a fact that the land cost was stated to be RM1,137,500 whilst the cost of constructing the golf course was RM874,500. This was the answer to the appellant's contention of absence of evidence.

[2] The minutes were admissible as they were 20 years old and found in a relevant government department file dealing with the relevant departmental matters. The fact that the author was not named did not make the minutes any less admissible.

[3] The error in quoting the number of the title was insignificant and petty. It would be a serious error if the numbers were the only details quoted but the form bore the description of the two pieces of land concerned as well though their numbers were in error. There was therefore no ambiguity.

[4] The learned judge rightly concluded in his grounds of judgment that a person who has parted with his land and has received the purchase money, as the defendant had in the present case, is merely a bare trustee of the land. His name may appear on the land title but he may assert no legal rights over it because the equitable and beneficial ownership has passed to the buyer. Since the plaintiff had proved that the defendant had sold the land to Berdikari the defendant was only a bare trustee of the land even though his name still appeared on the land title.

[5] The learned trial judge also found as a fact that Tambisan, the defendant and the Club were all inter connected with the "Tambisan Donation" and that there was evidence to show that the defendant was the person who dealt with Tambisan for the purpose of financing the building of the golf course and had authorised payments of major expenditures for the project albeit through the Labuan District Office. This conclusion was based on the evidence as found by the learned judge.

[6] The defendant's evidence to the Parliamentary Privileges Committee in May 1984 was most damning to the defendant as he made a statement and declared to the Committee that he was only a trustee to the land but now asserted that he was the true owner. It is trite that one has to be truthful in Parliamentary matters.

[Appeal dismissed with costs to be taxed.]

*[**Bahasa Malaysia** Of Headnotes Translation]*

Perayu/defendan adalah pemilik berdaftar sebidang tanah di Labuan ('tanah tersebut') dan adalah Ketua Menteri Sabah. Responden/plaintif adalah presiden Kelab Golf Labuan ('Kelab tersebut'). Plaintiff telah pada 1991 memfailkan satu writ memohon deklarasi di antara lain bahawa: (i) defendan memegang tanah tersebut secara amanah bagi pihak Kelab; (ii) defendan tidak mempunyai hak kepada pemilikan tanah tersebut; dan (iii) untuk perintah memotong nama defendan daripada suratan hakmilik tanah tersebut dan supaya nama Kelab didaftar sebagai ganti. Setelah penghujahan tiada kes untuk dijawab oleh defendan, Mahkamah Tinggi telah membenarkan permohonan plantif. Defendan telah merayu kepada Mahkamah Rayuan.

Di hadapan Mahkamah Tinggi, plaintif telah menegaskan bahawa defendan telah menjual tanah tersebut kepada Kelab dan adalah pemegang amanah (bare trustee) yang memegang tanah tersebut secara amanah untuk Kelab yang mana bertujuan untuk membina padang golf di atas tanah tersebut. Defendan sebaliknya, menegaskan bahawa tiada bukti bahawa beliau telah dibayar sebarang wang atau diberi balasan untuk tanah tersebut maupun defendan ataupun orang bagi pihak defendan menerima sebarang pampasan untuk tanah tersebut.

Terdapat bukti dikemukakan ke mahkamah mengenai wang derma sebanyak RM1.6 juta oleh Syarikat Berdikari ('Berdikari') dan Syarikat Tambisan ('Tambisan') melalui Majlis Sukan Sabah ('MSS') kepada Majlis Daerah Labuan ('MSL') atau kontraktor Syarikat Jati yang kemudiannya telah membina padang golf tersebut. Berdikari telah memohon untuk mendapat lesen pembalakan dari Kerajaan Tempatan atas syarat bahawa Berdikari akan membina komplex padang golf untuk Kelab tersebut. Tambisan telah ditubuhkan oleh Berdikari untuk melaksanakan kerja-kerja pembalakan.

Di hadapan Mahkamah Rayuan, peguambela untuk perayu telah menghujah bahawa: (i) walaupun wang derma dianggap sebagai balasan untuk tanah tersebut, tiada sebarang bukti bagaimana MSS menggunakan wang derma itu atau bagaimana ianya telah disebarkan; (ii) keputusan mahkamah adalah di luar tuntutan plaintif iaitu bahawa bayaran tersebut adalah daripada penjualan balak atau penolakan daripada hasil jualan balak yang berjumlah RM1 juta; (iii) minit panggilan telefon yang telah direkodkan dari Pegawai Daerah Labuan bagi pihak perayu kepada jabatan kerajaan berkenaan menanyakan tentang pendaftaran Kelab, yang mengatakan tentang pembelian harta oleh Kelab, tidak patut diterima masuk kerana direkodkan oleh orang yang tidak ternama; dan (iv) hakim telah membuat kesalahan apabila merujuk kepada tanah tersebut sebagai SL346 sahaja.

Isu utama adalah samada terdapatnya satu penjualan muktamad di antara pihak yang berkenaan.

Diputuskan:
Oleh Abu Mansor Ali HMR

[1] Yang arif hakim telah mendapati sebagai fakta, dari dokumen yang dikemukakan di hadapannya, bahawa terdapat satu transaksi penjualan tanah tersebut di antara Berdikari/Tambisan dan defendan. Yang arif hakim juga telah mendapati sebagai fakta bahawa harga tanah tersebut dinyatakan sebagai RM1,137,500 manakala kos untuk membina padang golf adalah RM874,500. Ini adalah jawapan kepada penegasan peguambela perayu mengenai ketiadaan bukti.

[2] Minit panggilan telefon tersebut boleh diterima masuk kerana ianya 20 tahun lama dan dijumpai di dalam fail jabatan kerajaan relevan yang melaksanakan hal jabatan yang relevan. Walaupun nama penulisnya tidak diketahui, ini tidak akan mengakibatkan minit tersebut tidak dapat diterima.

[3] Kesalahan di dalam rujukan nombor hakmilik adalah tidak penting dan remeh. Akan menjadi satu kesalahan yang serius jika hanya nombor dirujuk tetapi borang berkenaan telah juga mengandungi penghuraian kedua bidang tanah berkenaan walaupun nombornya adalah salah. Oleh itu tiada sebarang ketidakpastian.

[4] Yang arif hakim telah memutuskan di dalam alasan penghakiman beliau bahawa seseorang yang telah terasing daripada tanahnya dan telah menerima harga pembelian, sepertimana defendan di dalam kes ini, adalah hanya satu pemegang amanah (bare trustee) tanah tersebut. Namanya mungkin berada di dalam suratan hakmilik tetapi beliau tidak dapat menjalankan apa-apa hak undang-undang ke atasnya kerana pemilikan ekuiti dan faedah telah berpindah kepada pembeli. Oleh kerana plaintif

telah membuktikan bahawa defendan telah menjual tanah tersebut ke Berdikari, defendan hanya pemegang amanah (bare trustee) tanah tersebut walaupun nama beliau masih di atas suratan hakmiliknya.

[5] Yang arif hakim juga telah mendapati sebagai fakta bahawa Tambisan, defendan dan Kelab kesemuanya ada pertalian dengan "Derma Tambisan" dan ada bukti untuk menunjukkan bahawa defendan adalah orang yang berhubungan dengan Tambisan untuk tujuan pengurusan kewangan pembinaan padang golf tersebut dan telah meluluskan pembayaran perbelanjaan utama untuk projek itu walaupun melalui Pejabat Daerah Labuan. Keputusan ini adalah berdasarkan bukti yang didapati oleh yang arif hakim.

[6] Keterangan defendan kepada Jawatankuasa Keistimewaan Parlimen (Parliamentary Privileges Committee) pada Mei 1984 adalah paling menjejaskan kepada defendan kerana beliau telah membuat kenyataan dan deklarasi kepada Jawatankuasa bahawa beliau hanya pemegang amanah kepada tanah tersebut tetapi sekarang menegaskan bahawa beliau adalah tuanpunya tanah tersebut. Adalah menjadi kebiasaan undang-undang bahawa seseorang patut berterus-terang di dalam hal Parlimen.

[Rayuan ditolak dengan kos.]

Case(s) referred to:
Laurie v. Raglan Building Co Ltd [1942] 1 KB 152 ***(refd)***
Simirah v. Chua Hock Lee & Anor [1963] 29 MLJ 239 ***(refd)***
Yuill v. Yuill [1945] P 15 ***(refd)***

For the appellant - Manjit Singh (Colin Lau with him); M/s Colin Lau & Co
For the respondent - Dr CV Das (Robin Ch'ng & Steven Thiru with him); M/s Robin Ch'ng & Assoc

[Appeal from High Court, Labuan; Civil Suit No: 45 of 1991; [1997] 1 CLJ 321]

Reported by Cindy Chan

JUDGMENT

Abu Mansor Ali JCA:

We heard substantive arguments after which we adjourned this matter for judgment to a date to be fixed.

The Facts Of The Case

The facts of this case are as follows. The plaintiff was the present respondent and the appellant was defendant in the court below. The plaintiff was officiating as the President of Kelab Golf Labuan (the club) at the time of the writ. The defendant/appellant was the registered owner of a piece of land under Town Lease No. 207512589 (the said land).

By a writ dated 15 April 1991, at the High Court Labuan (amended on 20 August 1991) the respondent/plaintiff prayed for several declarations *inter alia* (1) that the defendant/appellant held the said land in trust for and on behalf of the club, (2) a declaration that the defendant/appellant has no right to the ownership of the said land and (3) that there be an order cancelling the defendant/appellant's name in the title to the said land and that the club be registered instead.

The High Court Labuan allowed the plaintiff/respondent's application after a lengthy hearing and appellant/defendant is dissatisfied with the High Court's decision and appeal to us.

The Plaintiff's Case

In the court below the plaintiff pleaded that the defendant is a bare trustee and held the said land in trust for the said club. For the defendant, they said that there is absence of evidence before the court that the defendant had been paid any money or any consideration for the said land or that the defendant had in any way been compensated for the said land by the plaintiff or anyone else on his behalf. For the defendant the only evidence before the court, if it is evidence, is the evidence of a donation of 1.6 million ringgit made by Syarikat Berdikari (Berdikari) and Syarikat Tambisan (Tambisan) through the Sabah Sports Council, to the Labuan District Council or to the contractor, Syarikat Jati who eventually built the golf course. The plaintiff urged the court to infer from the sum total of the evidence before it that the defendant must have been paid for the said land. That in essence is the plaintiff's case. The plaintiff also contended that there is no evidence how the defendant acquired the land or as to how he became the registered proprietor.

The History Of The Said Land

What then is the history of the said land that would entitle the plaintiff to make the present application, to say that the defendant holds the said land under bare trust for the club?

For a start we must turn to the Record of Appeal Jilid 2 p. 992 and to the Register Memorial No. 110180 (07). The said land was originally registered in the name of Yap Hyun Phen (Mr. Yap). The said land was, on that date, transferred to the defendant.

It is necessary for us to take a step backward and ask the relevant question. Where did Mr. Yap get the said land? It is not a matter of dispute since the records are clear. This land was originally jungle state land and it was not also unreasonable to infer that the state alienated this land to Mr. Yap for a certain purpose which purpose becomes very clear as this story unfolds but it is not difficult to see that Mr. Yap also held the said land so as to have it transferred to the defendant. So learned counsel's statement from the Bar that the defendant did not get the land from the state was to a certain extent true as it went.

Learned counsel for the appellant submitted before us that even if the donation was to be read as the price, the consideration for the said land, there is no evidence how the Sports Council applied the donation or how the donation was disbursed. Counsel contended that it is for the plaintiff to supply all this missing link before the plaintiff can succeed in this application for the declaration.

This submission led the learned Chairman of the panel of judges, Dato' NH Chan, to interpose to say that consideration can be in kind. It needed not be in cash. He quite rightly suggested that there can be an arrangement.

This comment from the learned judge elicited a statement from Mr. Manjit Singh, for the appellant, that it was true between 1973 to 1985 the defendant wanted to give this land as a gift to the Labuan Golf Club. Why the change of mind now? Or could the defendant be permitted to change his mind bearing in mind if the said land was originally intended or meant and alienated for the club?

Was there evidence or enough evidence that entitled the lower court, after looking at the circumstances as a whole, to come to a finding on the totality of the evidence that the said land, though registered in the name of the defendant, was intended to be a gift for the Labuan Golf Club?

The statement from the Bar by learned counsel for the appellant that between 1973-1985 that the defendant wanted to give this land as a gift to the Golf Club is to be found in the Appeal Record in Bahagian B Jilid 2 at p. 196 where the defendant had in fact signed a transfer and delivered the said signed transfer to the said club to effect the gift of the said land to the said Golf Club but unfortunately, it did not detract the intention of the giver behind the gift, the gift could not be perfected by registration of the transfer as the Golf Club could not pay the stamp duty of RM600,000 and the gift remained unperfected but the record is clear.

Page 200 Bahagian B Jilid 2 of the Record of Appeal confirms that the transfer of the said land was signed, on 29 August 1984, when the defendant was officiating, no less a personage, as the Chief Minister of Sabah. And at p. 201 of the said Appeal Record gave us who were the trustees of the said club. From the evidence of PW5 Christopher Chin, this was elicited in evidence:

> S. You say there you act on behalf of the trustees of Labuan Golf Club. Can you tell us who the trustees were at that time (29.08.1984)?
>
> J. Based on the copy of the Club Constitution made available to me, the trustees were Datuk Harris and Wong Chik Lim.

It is not disputed from the Appeal Record, the story went, that an attempt was made to get an exemption from the Finance Ministry for the payment of the Stamp Duty of RM600,000 for the transfer of the said land to the club when it was refused and it had to pay, the club was in no position to do so.

It may be said that the transfer, no doubt aborted but if it had succeeded, it would have been a transfer from the defendant, a bare trustee, to the defendant as a trustee of the Club. At the risk of repeating, it cannot be forgotten that at the time of the intended transfer the defendant officiated as the Chief Minister of Sabah and one may well ask if the said land was not for the Golf Club, would the transfer be signed by him?

At p. 18 of the Record of Appeal, para 17 the learned trial judge held:

> 17. I agree with the Plaintiffs' Counsel that these documents show the connection between the timber concession and the building of the LGC on the land and the connection between Berdikari, Tambisan and the Defendant. These documents also infer that there existed a sale transaction that involved Berdikari or Tambisan and the Defendant and where the Defendant was paid off for the land.

Before us the appellant's counsel submitted that the learned trial judge erred in making the above inferences on the evidence on the documents tendered before him.

The appellant's counsel further contended that there is absence of any evidence to support the above findings of the learned judge.

In order that we may decide whether the learned judge had erred or otherwise in making such findings, it is necessary that we should set out in detail the preceding paragraph of the judgment of the learned judge from paras 16 of his careful judgment where he said:

> 16. I can do no better than quote the submission by the plaintiffs' counsel and the list of documentary evidence relied on by the plaintiffs in support of this contention,

(2) **The Connection Between the Timber Concession to Syarikat Berdikari, The Logging by Tambisan Sdn Bhd and the Building of the Labuan Golf Club**

.1 This connection is made abundantly clear by the documentary and oral evidence given in Court. In this it is also material to note the time sequences, namely, the giving of the timber concession, the working of the concession and the building of the Golf Club, all of which took place between 1972 and 1975.

.2 The following documents tendered in Court, and duly marked as exhibits, show clearly the connection between the timber concession and the building of the golf club on the Defendant's land; and the connection between Syarikat Berdikari and Tambisan Sdn Bhd; and the involvement of the Defendant:

25.7.72: Syarikat Berdikari Board Meeting decides to apply for timber concession and in return to build a 9-hole golf course on Lot TG 412 in Labuan.

Note the following:

a) present are *inter alia*, Hussein Wahid Dally, Datuk Mohd Din, Haji Ali Green and Shamsuddin bin Assim.

b) TG 412, the land registered in the name of the Defendant, already identified as the land for the golf course (see exhibit P8)

7.8.72: Syarikat Berdikari's letter to Jabatan Hasil Bumi making their application, with offer to build golf course, and enclosing above Board minutes.

Note:

a) Lot 412 specifically identified for golf course.

b) Golf land cost specifically stated to be RM1,137,500/-.

c) building cost said to be RM874,500/- (see exhibit P7)

12.8.72: Jabatan Hasil Bumi gives approval for additional 9,000 acres timber land **on express conditions contained in Syarikat Berdikari's application letter** (see exhibit P6)

20.11.72: Jabatan Hutan writes to Syarikat Berdikari giving 7,000 acres timber land at Tambisan area, Sandakan (see exhibit P55)

22.12.72: Jabatan Hutan writes again to Syarikat Berdikari giving additional 2,000 acres **"supaya tuan dapat memenohi membuat satu Compleks Golf bertaraf Antara Bangsa di Labuan"**

Note:

a) letter is captioned **"Kompleks Golf – Labuan"** (see exhibit P60)

21.2.73: Jabatan Hutan **writes to Defendant giving "photo interpretation – of the area at Tambisan for Berdikari".**

Note:

a) the photo map is sent to Defendant "as requested". (see exhibit P61)

27.2.73: Syarikat Berdikari Board meeting deciding to assign the logging licence to "newly established company" Tambisan Sdn Bhd

Note:

a) present are Hussein Wahid Dally, Datuk Mohd Din (Chair), Haji Ali Green and Shamsuddin Assim.

b) the assignment is recorded as for "convenience in income tax computation purposes". (see exhibit P56)

1.3.73: Syarikat Berdikari writes to Jabatan Hutan for licence to be issued in name of Tambisan Sdn Bhd stating **"we have established a new company in the name of Tambisan Sdn Bhd to carry out logging on behalf of Syarikat Berdikari".**

Note:

a) letter is captioned "fund for Labuan Golf Club".

b) letter signed by Hussein Wahid Dally (PW3) as Managing Director.

c) purpose is stated to be for tax purposes (see exhibit P9)

d) Tambisan Sdn Bhd is a $2/- company with Tan Sri Wong Chik Lim as principal Director and shareholder (see exhibit P19)

3.3.73: Syarikat Berdikari writes again to Jabatan Hutan forwarding minutes of Board meeting on logging licence for Tambisan Sdn Bhd.

Note:

a) letter is captioned "fund for Labuan Golf Club" and signed by Hussein Wahid Dally (PW3) (see exhibit P63)

5.3.73: Jabatan Hutan replies to Syarikat Berdikari declining to issue licence in the name of Tambisan Sdn Bhd but suggesting that Power of Attorney be given (see exhibit P58)

14.3.73: Chief Minister's Department writes to Jabatan Hutan stating that licence could be issued in the name of Tambisan Sdn Bhd **"olih sebab Syarikat itu ialah satu Syarikat 'associate' dengan Syarikat Berdikari Sdn Bhd."** (see exhibit P62)

20.3.73: Jabatan Hutan writes to Tambisan Sdn Bhd stating that Government has agreed to issue licence in its name as **"an associate"** of Syarikat Berdikari. (see exhibit P57).

If we may pause here temporarily, perhaps we cannot help but notice and cannot but infer the unseen hand of the defendant in the approval of this timber licence. The judge then continued:

23.3.73: Tambisan Sdn Bhd writes to Jabatan Hasil Bumi thanking them for approval of the 11,000 acres of timber **"for the Labuan Golf Course fund".** Letter states further that **"the Labuan Golf Course project is under way"** and ask for an additional 1,000 acres as "we are presently short of funds".

Note:

a) letter is captioned **"fund for Labuan Golf Course"**.

b) letter is signed by Tan Sri Wong Chik Lim as Chairman [see also evidence of Victor Wong (PW9) on this]

c) letter is copied to Syarikat Berdikari. (see exhibit P15)

The record continues:

10.5.73: Licence issued to Tambisan Sdn Bhd (see exhibit P66)

18.8.73: Note in the file of Registrar of Societies records Defendant as pressing for registration of Labuan Golf Club **"because the Club has bought some properties and is now negotiating another piece of land to be purchased in the name of a committee member first, as the Club has not been registered yet"** (see exhibit P50)

xxx xxx

xxx xxx

i) **Exhibit P10:** letter dated 11.9.75 from Syarikat Berdikari to Defendant reiterating their letter of 7.8.72 to Jabatan Hasil Bumi promising to build the golf course in return for the timber concession.

ii) **Exhibit P11:** letter dated 25.11.75 from Syarikat Berdikari to Chief Minister's Department stating "we applied for a timber licence from the State Government on the condition that we will build a golf course complex for the Golf Club Labuan, and it was on this condition that the State Government approved and granted us the special timber licence".

iii) **Exhibit P14:** letter dated 11.10.90 from the Defendant to Dato Mohd Din of Syarikat Berdikari under caption "Tanah TL 207512589 – Labuan Golf Club", stating **"Saya suka menarik perhatian saudara kepada tahun 1972 hingga tahun 1975 dimana kita semua berusaha untuk mendapatkan kawasan kayu balak dan seterusnya menggunakan wang tersebut untuk pembangunan 9 lubang Golf Club."**.

Apart from the above documents and evidences in paras. 18 and 19 of the learned judge's grounds of judgment read: which incidentally told the story further how this golf course is to be financed and paid for and effectively and powerfully answering the learned appellant's counsel's submission that, so-called, **there was absence** of any evidence of payment, consideration set off against the defendant. We set down paras. 18 and 19 of the same judgment as follows:

> 18. P7 shows the application for the said 9,000 acres.
>
> 19. Hussein Wahid Dally (PW3), a Director of Berdikari, gave evidence that Berdikari did apply for a 9,000 acres timber concession from the State Government by way of letter (P7). PW3 also confirmed that in return for the 9,000 acres Berdikari proposed to build a 9-hole golf course in Labuan together with a club house, a swimming pool and a tennis court. PW3 also confirmed that Tambisan was to do the logging, sale of logs and also to be in charge of the funds derived from the sale of logs.

Our answer in all the appellant's counsel's contention of absence of evidence is this: at p. 19 of the Appeal Record, in his long judgment, the learned judge find as a fact, from documents tendered before him, that there was a sale transaction of the said land between Berdikari/Tambisan, the two development companies and the defendant.

In P7 the learned judge also found as a fact that the land cost was stated to be RM1,137,500 whilst the cost of constructing the golf course was RM874,500. In p. 19 of the Appeal Record the learned judge found from letter P10 dated 11 September 1975, from PW3 to the defendant, states that the land was bought from the defendant. PW3 also testified that he would not have signed P10 if it was not true.

The learned judge in his grounds of judgment, as in p. 19 of the Record of Appeal, made this comment:

> An extract from P10 is,
>
> > You will remember that when we negotiate to purchase your land for the golf course, it was made clear to you that we are purchasing this land for the golf course on behalf of the Labuan golf course ... we hereby request that with immediate effect to enter into an irrevocable agreement to transfer the said land purchased by us to the Labuan golf course, an area of 74 acres as agreed by you.

PW3 also said in evidence,

S. I think we can help you by looking at your own letter, this is IDP10, last paragraph. Can we take it that by September 1975 the land had been purchased?

J. By September 1975 1 think we had purchased the land by this date.

S. Can you tell us how much was the land bought for?

J. RM1,137,500.00.

Here, from the above evidence the learned judge again answered the defence contention of absence of evidence when he said:

> The defence contends that the evidence of PW3 cannot be relied because PW3 does not know if the defendant had in fact been paid for the land. It is also submitted by the defence that the evidence of PW3 is inconsistent and contradicts his evidence contained in P13 and P14, therefore unreliable.

After setting out the evidence given by PW3 the learned judge held at p. 20, of the learned judge's judgment he accepted that the testimony of PW3 showed that he knew that the defendant was paid for the land to the tune of RM1,137,500 but PW3 was not sure of the detail how the transaction by which the land was sold because he said, the transaction was handled by Tan Sri Wong Chik Lim, Chairman of Tambisan. The learned judge said he would hardly call that evidence inconsistent or contradictory. Then in exhs. P12 and P13 tendered to him it showed that Berdikari through PW3 and Datuk Mohd Din the director of the company, maintained that the said land was purchased from the defendant.

Before us counsel for the appellant contended that from pp. 87 to 92 are the further particulars filed and it was the plaintiff's case that payment was either from the proceeds of timber sale or some set off or accounting adjustment to the defendant from the proceeds of timber for period from 1972 to 1975 to the sum of RM1 million.

Appellant's counsel also contended that the judge's finding was contrary to the plaintiff's pleaded case. With respect to the learned counsel, we have considered this submission and we think there is no merit in this contention.

Then there is the contention of the learned counsel for the appellant that minute P50 at p. 1135 of the Appeal Record should not have been admitted by the learned judge. The minute was in the relevant file and in the following terms:

Note

D.O. Labuan ring up to enquire about the registration of this Club for Datuk Harris was pressing him to get this Club registered as soon as possible – within 3 weeks if possible because the Club has bought some property and is now negotiating another piece of land to be purchased in the name of a committee member first, as the Club has not been registered yet.

sgd
18/8/73.

The contention of counsel is that the minute should have been excluded as the minute had been made by an unknown person. We find no merit in this as it was made at the time approximately this transaction and tendered, at most, recording the actual fact that there was a phone call from District Officer Labuan even if it is not tendered for the specific purpose to prove the truth of the statement. It was a note found in a file of the relevant department of Government, the Registrar of Societies on a matter pertinent to the work of the said department of registering a club, as to an enquiry whether the Labuan Golf Club had been registered. We think the minute is admissible as it is 20 years old and found in a relevant government department file dealing with the relevant departmental matters. The fact that the author was not named does not make the minute any the less admissible.

Mr. Manjit Singh also drew the court's attention that the lands mentioned in the Borang 1, Permohonan Untuk Pendaftaran Pertubuhan at p. 1132 Appeal Record in particular SL346 and SL347 were not the lands belonging to the defendant.

The appellant's counsel's submission that the learned judge had erred when he held at p. 27 of the Appeal Record:

> (b) It is interesting to note that in the Club's application for registration as a society two pieces of property were mentioned, mainly SL346 for the "Bangunan Golf" (see P49), SL346 eventually becoming part of Grant No. 20790412, the predecessor title to the land (see P46).

Mr. Manjit Singh referred us to p. 1132 of the Appeal Record where the learned judge found that reference. In p. 1132 of the Record of Appeal the two lands were:

(a) Bangunan Kelab Labuan – SL346;

(b) Padang Golf Labuan – SL347.

Mr. Manjit went on to contend that the learned judge had erred in describing the land as SL346 only.

We are of the view the error is insignificant and petty and occurred in quoting the number of the title. It would be a serious error if the numbers were only detail quoted but the form bore the description of the two pieces of land concerned as well though their numbers were in error. There was then therefore no ambiguity. The land which was in actual fact pleaded by the plaintiff had been numbered SL393 at p. 989 which was part of Grant No. 20790412 at p. 1132 of the Appeal Record. We hold the mistake in giving the lot number to be of no consequence when the land has been sufficiently identified.

After having had the advantage of perusing all the evidence before him and looking at the plaintiff's case as a whole, the learned judge concluded in para. 29 and para. 30 of his grounds of judgment at p. 21 of the Appeal Record:

> 29. With respect, a person who has parted with his land and has received the purchase money as the Defendant in the present case is merely a bare trustee of the land. His name may appear on the land title but he may assert no legal rights over it because the equitable and beneficial ownership has passed to the buyer. Since the Plaintiffs have proved that the Defendant has sold the land to Berdikari the Defendant is only a bare trustee of the land eventhough his name still appears on the land title. I have for my guidance the case of *Kuruppiah Chettiar* [1971] 2 MLJ 116 where it was held that the registered proprietor having sold his entire interest in the land and received payment in full held the legal estate only as a bare trustee for the respondent who was the equitable owner, also *Temenggong Securities Ltd & Anor. v. Registrar of Titles Johore & Ors.* [1974] 2 MLJ 45.
>
> 30. Thus the Defendant having sold the land to the Plaintiffs, *albeit* in a circuitous manner is now a bare trustee for the Plaintiffs, a *fortiori* the circuitous manner how Tambisan, the Defendant and the building of the LGC are inter-connected with the "Tambisan Donation".

The learned trial judge also found as a fact that Tambisan, the defendant and the Labuan Golf Club are all interconnected with the 'Tambisan Donation" so-called. At p. 21 and p. 22 of the Appeal Record para 30 of his judgment he set as follows:

> 31. Victor Wong @ Wong Ket Sing (PW9), a past Director of Tambisan, testified to show the connection between Tambisan and the LGC,
>
> S. How does ST, in what way was ST building the LGC?
> J. As far as I can remember there was some arrangement whereby some funds were to be given to LGC so that they can take over the timber land, fund to be given to LGC by ST, so that ST can take over the timber land.
>
> S. Can you make it clear what you mean ST take over the timber land?
> J. That is the timber licence to be issued to ST.

32. PW9 further said in evidence,

S. If as you say donations were to go to Labuan Golf Club where would one fit that in the statement of accounts?
J. There is, in the accounts there is no mention of LGC because all the donation has been channeled to the Sabah Sports Council.

33. This is confirmed by John Liaw Chee Shing (PW6), a Public Accountant, who audited Tambisan's accounts. PW6 said that the audited accounts of Tambisan for the year ended 31.12.1974 showed a donation of RM1,682,160.00 to "Sports Council" leaving a debit balance of RM392,118.00, see P21 and P22. PW6 is of the view that it is abnormal for a company to give away 99.52% of its profits as donation.

34. PW9 confirms that the RM1,670,000.00 less 5% to the Sports Council was meant for the LGC. PW9 also testified that the money was remitted to Labuan also through the Labuan District Council direct to the LGC or to the main contractor of the LGC, that is, Jati (Malaysia Timur) Sdn Bhd. It is also PW9's testimony that he (PW6) signed remittance slips for periodic payments to Jati based on instructions of the Defendant and by the Chairman or Directors of Tambisan,

S. You remitted the money?
J. I am not directly involved in the remittance usually by the Accountant but I am involved in the signing of the remittance slips.

35. PW9 further said in evidence,

S. The name of the contractor is Jati (Malaysia Timur) Sdn Bhd?

J. Yes.

S. What was the ... between Tambisan and these recipients in Labuan, whether the Club, contractor or District Council know, would you know when to send, how much to send?
J. Based on instructions I received from Defendant sometimes from the Chairman or Directors.

S. You remitted the money?
J. I am not directly involved in the remittance, usually by the Accountant but I am involved in the signing of the remittance slips.

36. Jim Rajaratnam (PW8), a Consultant Engineer, testified that the Defendant as the Co-ordinator of the LGC project has enough clout to arrange finance and to ensure works are carried out.

S. What in your opinion or perception was the role of the Co-ordinator in this project?
J. To arrange finance and to ensure the work was carried out.

37. There is evidence to show that the Defendant authorized payments of major expenditures. Even if payments were made through the Labuan District Office, copies of statement of accounts were sent to the Defendant on a regular basis, see P26, P33, P34, P35, P27, P30.

38. The accounts of Jati showed receipt of RM334,339.98 in 1974 where none was shown in the previous year, see P54B. P25 which is Statement of Account from the Labuan District Office shows payment made to Jati for the sum of RM80,000.00 which is not shown in Jati's 1973 account.

39. It is the submission of the Plaintiffs' Counsel that when the two above sums are added together, the total sum is RM414,339.98 which is close to the architect's assessment of the cost of the LGC project of RM418,095.50, see P40. P40 alone shows that the total expenditure including the work done by Jati amounted to RM720,991.90. It is submitted by the Plaintiffs' Counsel that out of the Tambisan Donation there are two possible sums unaccounted for, that is either RM1,234,256.60 or RM949,008.91. The Plaintiffs' Counsel thus question what happened to these sums.

40. The submission by Counsel for the Defendant in answer to the above is that while the submission by the Plaintiffs' Counsel may have covered matters such as the flow of funds, the role of Tambisan, the Defendant as Co-ordinator, the Labuan District Office and Jati there was no submission by the Plaintiffs' Counsel on any payment to the Defendant for the land.

41. That may be so. But the Plaintiffs have adduced evidence to show how the donation from Tambisan eventually was used to build the LGC.

42. Further, PW8 testified that the Defendant was the person dealing with Tambisan for the purpose of financing the building of the LGC. PW8 said in evidence,

S. Would it be right Datuk Harris was the person who dealt with Tambisan for the purpose of financing the building of the Golf Course?

J. I would say so.

43. PW8 even wrote to the District Office to request that the District Office pay RM70,000 to one, Shamsuddin bin Assim since the Defendant had approved the payments for some work done for the LGC, see P33, P34, P35, P27, P38 and P30.

After having perused the judgment of the learned judge so far we find he was entitled, as he did so, to make the following conclusion at p. 25 of the Appeal Record and, with respect, we say that the conclusion was based on the evidence as found by him as follows at para 44 of his judgment:

> 44. There is even evidence that the Defendant would give instructions to Tan Sri Wong Chik Lim, Chairman of Tambisan, authorizing Tan Sri Wong to make payments to anyone. An example is the payment to PW8 who was paid RM10,000.00 by Tan Sri Wong on the instruction of the Defendant, which payment was later regarded as payment on behalf of the LGC, see P30, Ex.31 and P32.
>
> 45. From the evidence above it is clear that the Defendant had a large say in the building of LGC and it would be reasonable to infer that the Defendant knew or should be able to explain the whereabouts of the missing RM1,234,256.60 or RM949,008.91 from the "Tambisan Donation".

We find the learned judge correctly approached a number of very telling evidence before him, calling for the defendant's explanation, which facts or evidence if they remain explained must be interpreted or taken to be unexplanable. He said at para 46 at p. 25 of his judgment as follows:

> 46. After going through all the oral and documentary evidence, with respect, I agree with the submission by the Plaintiffs' Counsel that there are many questions to be answered by the Defendant, unanswered by the Defendant. I can do no better than to reproduce some of the questions raised by the Plaintiffs' Counsel for the Defendant to answer,
>
> (6) Why the Defendant has to Answer?
>
> 1. The Plaintiff submits that on the oral and documentary evidence presented to Court, the Defendant has to answer on the following questions raised from the circumstances and events established:
>
> (1) How was it possible for Syarikat Berdikari to identify the Defendant's land as the land on which the golf course was to be built when they first made the application for the timber concession on 7.8.72 (see exhibit P7 and P8)?
>
> (2) The Defendant admits in his Statement of Defence that he was aware that Syarikat Berdikari had identified his land to the State Government for the building of the golf course [see para 1(f) of the Re-Amended Statement of Defence]. If so, what was the arrangement between the Defendant and Syarikat Berdikari that they should be allowed to use 74 acres of valuable land for a golf course in return for a timber concession?

There were also other telling evidence which also call for the defendant's explanation as follows:

> (1) If no sale transaction took place between Berdikari and the Defendant why did the defendant write P14 proposing to cancel the agreement,

maka dengan ini, saya menganggap sebarang bayaran kalau ada sebagai dihilangkan (forfeited), oleh yang demikian saya juga menetapkan sebarang perjanjian diantara syarikat saudara dengan saya jikalau ada adalah dibatalkan (annulled)

(2) Why should the defendant be forfeiting any payment unless there is money to forfeit pointing to a sale transaction?

(3) How did Berdikari come up with the figure of RM1,137,500 as the sale price of the land as shown by the letter (P7), and the testimony of PW3?

(4) Why did the defendant try to obtain Berdikari Directors' affidavit affirmation that there was an intention to sell but no payment was received by the defendant if there really was no sale of the property, see P13?

(5) (a) How would the defendant explain P50 where a telephone conversation with the District Officer of Labuan was recorded stating that the defendant was pressing for the registration of the club because "the Club has bought some property and is now negotiating another piece of land to be purchased"?

We agree with the learned judge that the following evidence is most damning to the defendant. Was the defendant lying to the Parliamentary Privileges Committee, in May 1984, when he made a statement and he declared that he is only a trustee to the land, and how can he now assert that he is the true owner? It is trite law that one has to be truthful in Parliamentary matters.

The learned judge at p. 38 of the Appeal Record held:

75 The Defendant even denied in Parliament on 28.05.1984 that he is the owner of the land. He told the Privileges Committee that the land belongs to the LGC, see P40, with the Defendant saying that "... Itu rekod sahaja ..., kepunyaan Golf Club. Mereka beri nama saya menjaga kerana takut gaduh-gaduh". Thus a bare trustee,

Datuk Harris bin Mohd. Salleh: Jadi saya ada satu title di sini untuk rekod. No.(1) tadi, saya mengaku nama saya, saya mahu rekodkan di sini Title 207521589 seluas 74.68 ekar ialah Golf Course yang mana saya mesti mempunyai nama di situ. Itu rekod sahaja – Golf Course sudah dipakai di situ 8 tahun, Golf Course sudah dibuat, kepunyaan Golf Club. Mereka beri nama saya menjaga kerana takut gaduh-gaduh. Now, summing up, boleh saya summing up?

76. With respect, perhaps needless to say the Defendant's admission in Parliament lends more credence to the Plaintiffs' case that the Defendant knows that he is only a trustee of the land and that it is more likely than not that he has also been paid off for the land.

In the court below, at the close of the plaintiff's case, the defendant's counsel intimated to the trial judge that he would only be making a submission of no case to answer. The defendant, it they wanted to do that, must elect to stand on his submission and was not calling witnesses. In the case of *Simirah v. Chua Hock Lee & Anor.* [1963] 29 MLJ 239 the Court of Appeal quoted with approval the practice in *Laurie v. Raglan Building Co. Ltd.* [1942] 1 KB 152, 154 and *Yuill v. Yuill* [1945] P. 15 that when defence counsel is about to make a submission of no case to answer he must elect that he will call no evidence and that the judge should refuse to rule unless he maker the election. Upon our questioning the appellant's counsel on this he made a statement from the Bar that the defendant had dully elected and he was, therefore, bound by his election and if he failed so be it.

After hearing of submission of no case to answer the learned judge found for the plaintiff and duly granted the prayers prayed for. He held in his long judgment:

Conclusion

83. The oral and documentary evidence led by the Plaintiffs points, on a preponderance of evidence and on a balance of probabilities, irresistibly that the Plaintiffs have made a case against the Defendant for the Defendant to answer and since the Defendant has elected not to adduce any evidence the Defendant fails: *International Times* [1980] 2 MLJ 86 FC and therefore I give Judgment in favour of the Plaintiffs against the Defendant.

Declaration/Judgment

84. Declaration/Judgment for the Plaintiffs against the Defendant as follows,

(1) the Defendant holds the land as a bare trustee for and on behalf of the Plaintiffs who are rightfully entitled to have its name registered on the land title held as Town Lease No. 207512589.

(2) the Plaintiffs possess an irrevocable licence in equity to permanently occupy and remain on the land and enjoy all the benefits thereof.

(3) the Defendant is bound by proprietory or promissory estoppel and/or estoppel by conduct not to resile from his obligation to convey and transfer the land into the name of the Plaintiffs, forthwith.

(4) the Defendant is not entitled to remain as the registered proprietor of the land, the name of the Defendant be expunged from the land title of the land and the same be rectified by the name of the Plaintiffs substituted in place thereof, forthwith.

(5) the Defendant do transfer the land into the name of the Plaintiffs and/or Plaintiffs trustee, forthwith.

(6) the Defendant is to pay costs to the Plaintiffs.

85. I do grant stay of execution pending appeal.

After hearing submissions of both counsel, we say, it is trite law that we should be slow in interfering with the finding of the learned trial judge. With respect in this instant, we come to the conclusion that the learned trial judge, based on the evidence before him, had found, at para 48, of his judgment thus:

> 48. Now that the Defendant has not come forward to answer any of the questions I agree with the submission by Plaintiffs' Counsel that this is a factor to be taken into account. In *Jones v. Dunkell* [1958-1959] 101 CLR 298 Menzies J said that "where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstances that the Defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference".

As we said the learned judge has correctly decided this matter. For the reasons given in the learned judge's judgment, with which reason we fully agree, we hereby dismissed this appeal and affirm the order made by the learned judge with costs to be taxed. The deposit is to be paid to the respondent on account of taxed costs.